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OFFICE OF PETITIONS

In re Application of :
Gregory Paul Myers, et al. :
Application No. 09/491,098 : DECISION ON PETITION
Filed: January 25, 2000 :
Attorney Docket No. 30874.80USU1/SEA9029 :

This is a decision on the petition under 37 CFR 1.181 (no fee), filed May 5, 2006, requesting withdrawal of the holding of abandonment in the above-identified application. The delay in responding is regretted.

The petition is **DISMISSED**.

Any request for reconsideration of this decision should be filed within two (2) months from the mail date of this decision. *Note* 37 CFR 1.181(f). The request for reconsideration should include a cover letter and be entitled as a "Renewed Petition under 37 CFR 1.181 to Withdraw the Holding of Abandonment."

The application became abandoned for failure to reply in a timely manner to the Notice of Allowance and Fee(s) Due mailed, November 17, 2005, which set a shortened statutory period for reply of three (3) months. No extensions of time under the provisions of 37 CFR 1.136(a) was obtained. Accordingly, the application became abandoned on February 18, 2006.

Petitioner asserts that the Notice of Allowance and Fee(s) Due mailed November 17, 2005 was not received.

A review of the written record indicates no irregularity in the mailing of the Notice on November 17, 2005, and, in the absence of any irregularity, there is a strong presumption that the Notice was properly mailed to the practitioner at the address of record. This presumption may be overcome by a showing that the Office action was not in fact received. In this regard, the showing required to establish the failure to receive the Office action must consist of the following:

1. a statement from practitioner stating that the Office action was not received by the practitioner;
2. a statement from the practitioner attesting to the fact that a search of the file jacket and docket records indicates that the Office action was not received; and
3. a copy of the docket record where the nonreceived Notice would have been entered and docketed had it been received must be attached to and referenced in the practitioner's statement.

See MPEP § 711.03(c) under subheading "Petition to Withdraw Holding of Abandonment Based on Failure to Receive Office Action," and "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 Official Gazette 53 (November 16, 1993).

The evidence presented by applicant is insufficient to withdraw the holding of abandonment since the petition has failed to comply with requirement (3) above. While petitioner must submit a copy of the docket record where the non-received Office communication would have been entered and docketed had it been received, the docket record submitted appears to be incomplete. For example, it is noted that petitioner's docket record contains dates from June 2005 thru April 2006. However, there is no entry for receipt of the Notice of Allowance and Fee(s) Due mailed on June 2, 2005 or the Notice of Withdrawal from Issue mailed on August 3, 2005. Therefore, the docket record presented cannot be relied on to show that **all** USPTO communications were entered and docketed when received.

Absent the required evidence to establish nonreceipt of the Notice mailed November 17, 2005, the petition requesting withdrawal of the holding of abandonment cannot be granted at this time.

If petitioner cannot supply the evidence necessary to withdraw the holding of abandonment, or simply does not wish to, petitioner should consider filing a petition under 37 CFR 1.137(b) stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the \$1,540 petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Since a petition under 37 CFR 1.181 requires no petition fee, the \$130 petition fee submitted on May 5, 2006 will be refunded to petitioner's deposit account.

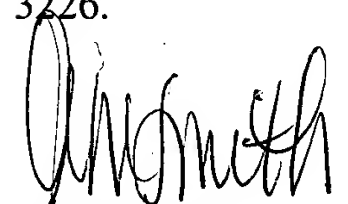
Further correspondence with respect to this matter should be addressed as follows:

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 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3226.



Andrea Smith
Petitions Examiner
Office of Petitions